

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY 11 3: 53

COMMONWEALTH OF VIRGINIA )

v. )

LEE BOYD MALVO, )  
Defendant. )

CLERK  
CRIM. NO. 102888

**MEMORANDUM IN SUPPORT OF COMMONWEALTH'S RESPONSE TO  
DEFENDANT'S MOTION FOR DISCOVERY**

There is no constitutional right to discovery in Virginia. Lowe v. Commonwealth 218 Va. 670 (1978). Discovery is limited in Virginia to that provided for under Rule 3A:11. Spencer v. Commonwealth 238 Va. 295 (1990). In addition to the materials covered by Rule 3A:11, the Commonwealth is under a duty to provide exculpatory information as well. United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland 373 U.S. 83 (1963); Kyles v. Whitley 115 U.S. 1555 (1995).

Rule 3A:11 is applicable where a Defendant is charged with capital murder. The Commonwealth respectfully submits that the Court should simply enter an Order consistent with the provisions of Rule 3A:11 in this case. The Commonwealth will submit a proposed Discovery Order upon the hearing of Defendant's Motion. This Order was written by our distinguished former Chief Judge James Cacheris. This order is sometimes referred to inaccurately as the "Commonwealth's Order."

Rather than succumb to the anticipated defense argument, to wit; *that this is a capital case and so the defendant should receive more discovery than required by law*, the Commonwealth respectfully invites the Court to reaffirm that we are a Nation governed by laws and not men and adhere to the provisions of Rule 3A: 11. If

there is any case in which the Court should strictly follow the law, it is in a capital case.

The Commonwealth also requests the Court to condition it's Order on reciprocal discovery to the Commonwealth.

### CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that the Court deny the Defendant's Motion.

The Commonwealth reserves the right to provide the Court with additional authority at the hearing of this matter.

Respectfully submitted,

Raymond F. Morrogh/  
Chief Deputy Commonwealth's Attorney

Certificate of Service

I hereby certify that a copy of the foregoing Response to Defendant's Motion was made available and mailed to Michael Arif, Esq. and Craig Cooley, Esq., Counsel for the Defendant, this 24th day of February, 2003.

Raymond F. Morrogh

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR FAIRFAX COUNTY**

**COMMONWEALTH OF VIRGINIA**

**v.**

**CRIMINAL No. 102888**  
**Hon. Jane Marum Roush**

**LEE BOYD MALVO**

**COMMONWEALTH'S RESPONSE TO DEFENDANT'S**  
**MOTION FOR EXCULPATORY EVIDENCE**

The Commonwealth will respond seriatim to Defendant's numbered paragraphs for purposes of Judicial economy.

The Commonwealth hereby objects to the definition of "the Commonwealth" as supplied by Defendant in the preamble to his Motion. Defendant has invented a definition of "the Commonwealth" which is contrary to the clear language of Rules 3A:11 and 3A:2(b). First, Rule 3A: 11 refers to "the Commonwealth's Attorney" and not "the Commonwealth." Furthermore, the phrase "Commonwealth's Attorney" is clearly defined by Rule 3A:2. It is the Commonwealth's Attorney who is governed by Rule 3A:11. Under Rule 3A:2(b) the Commonwealth's Attorney is deemed to include assistant and acting Commonwealth's Attorneys. Contrary to Defendant's assertion in the preamble of his motion, Rule 3A:11 does not obligate the Commonwealth's Attorney to supply to Defendant information in the possession of virtually every agency, whether law enforcement or not, in the United States, as well as any private citizen who the Commonwealth's Attorney "might reasonably be expected to believe to [has] such information."

To the contrary the language of Rule 3A: 11 clearly and amply defines the scope of the Commonwealth's duties with respect to Discovery materials. In the case of written or oral

statements of the accused to law enforcement officers, the Commonwealth's Attorney must turn over statements "*the existence of which is known to the Commonwealth*". Rule 3A: 11(b) (i). In other words, if the Commonwealth's Attorney is aware of statements made by the Defendant to law enforcement personnel he has to give them to the Defendant in accordance with the Rule.

With respect to certain scientific tests as set forth under Rule 3A:11 (b) (ii), the Commonwealth's Attorney must supply these when they are both known to the Commonwealth's Attorney and within his custody and control. Finally, with respect to tangible items, photographed buildings, places and documents, the Commonwealth's Attorney must provide them to the Defendant when they are in the custody and control of the Commonwealth and there has been a showing of both materiality to the defense, and the reasonableness of the request.

In summary, it is submitted that the Defendant seeks to hold the Commonwealth's Attorney responsible for information outside of his custody, control and knowledge by defining a term of art as he sees convenient to his purposes rather than as the terms are defined by the Rules of Court. Defendant's definition is overbroad, burdensome, and contrary to the law which the Court is bound to follow. The Commonwealth's Attorney asks the Court to use the definition of Commonwealth's Attorney as stated in Rules 3A: 2(b) and 3A:11. Of course, the Commonwealth recognizes that should discoverable information come into its possession from sources other than its own agents it has an obligation to provide that which is within its custody and control, or knowledge, depending upon the type of information in question.

**ANY AND ALL EVIDENCE THAT THE DEFENSE MAY USE, ALONE OR IN CONJUNCTION WITH OTHER EVIDENCE, THAT BEARS ON THE CHARACTER OR QUALITY OF THE POLICE INVESTIGATION, SUCH AS ANY EVIDENCE THAT THE POLICE DID NOT PURSUE CERTAIN LEADS OR SUSPECTS, OR THAT THE POLICE TAMPERED WITH OR PLANTED EVIDENCE.**

1. There is no legal authority for Defendant's request for the information sought in this paragraph. With the exception of the request for information that the police tampered with or planted evidence, this paragraph does not even seek exculpatory evidence. Instead, it amounts to a fishing expedition into the investigatory methods and internal decision making processes of law enforcement officials. It should be denied.

**ANY AND ALL CONFESSIONS OR STATEMENTS OF ANY KIND MADE BY DEFENDANT OR ANY ALLEGED CO-CONSPIRATOR THAT MAY BE PERTINENT TO THIS CASE IN EVERY MEDIA IN WHICH EACH SUCH CONFESSION OR STATEMENT MAY EXIST.**

2. The Defendant is not entitled under Rule 3A:11 to statements of his co-conspirator except insofar as they may tend to exculpate him. In addition, the Defendant is entitled to the substance of his oral statements and copies of written or recorded statements but not "*in every media in which they may exist.*" For example, if the Commonwealth's Attorney decides to re-copy a written statement on to a computer disk, or a yellow legal pad, the Defendant is not entitled to this work product of the Commonwealth.

**THE NAMES AND ADDRESSES OF ALL PERSONS THE PROSECUTION PROPOSED TO OFFER AS WITNESSES AT THE TRIAL OR ANY HEARING OF THIS CASE, AND ANY PERSONS WITH KNOWLEDGE OF ANY FACTS AND CIRCUMSTANCES SURROUNDING THE CRIME OR THE DEFENDANT.**

3. Rule 3A:11(2) specifically states that it does not authorize discovery of statements made by Commonwealth's witnesses, or prospective Commonwealth's witnesses. Furthermore, the Defendant is not entitled to a list of the Commonwealth's witnesses. Lowe v.

Commonwealth, 218 Va. 670 (1977); Watkins v. Commonwealth, 229 Va. 469 (1985).

**THE NAMES AND ADDRESSES OF ALL PERSONS WHO HAVE GIVEN RECORDED STATEMENTS TO THE COMMONWEALTH.**

4. This is not discoverable material under Rule 3A:11. Bellefield v. Commonwealth, 215 Va. 303 (1975).

**THE NAMES AND ADDRESSES OF ALL PERSONS WHO HAVE GIVEN ORAL STATEMENTS TO THE COMMONWEALTH.**

5. This is not discoverable material under Rule 3A:11 (2). Hackman v. Commonwealth, 220 Va. 710 (1980).

**ANY AND ALL INFORMATION CONCERNING ANY ALLEGED PRIOR CRIMINAL RECORD OF THE DEFENDANT, INCLUDING BUT NOT LIMITED TO, FELONY AND MORAL TURPITUDE MISDEMEANOR CONVICTIONS.**

6. The Commonwealth agrees to provide the criminal record of the Defendant. The Commonwealth is not required by law to provide "*any and all information concerning any alleged prior criminal record of the defendant*" as requested in Defendant's this paragraph of Defendant's Motion. The Commonwealth is uncertain of what Defendant means by this additional verbiage attached to his request for his criminal record.

**ALL MEMORANDA, DOCUMENTS, AND REPORTS TO, FROM, AND BETWEEN LAW ENFORCEMENT OFFICERS CONNECTED WITH ANY MATTER RELATING TO THE STATEMENTS AND INFORMATION PROVIDED BY ANY ALLEGED PARTICIPANTS OR ANY OTHER WITNESSES REGARDING THE DEFENDANT IN THE KILLING.**

7. The materials sought under this paragraph are not discoverable. The request seeks internal Commonwealth documents clearly excluded by Rule 3A:11 (2) from Discovery by Defendant. The Court should deny this request.

**ALL MEMORANDA, DOCUMENTS AND REPORTS TO, FROM AND BETWEEN THE INVESTIGATIVE STAFF OF THE PROSECUTION, EXCLUDING THOSE PORTIONS, IF ANY, WHICH CONTAIN THE OPINION, THEORIES, OR CONCLUSIONS OF THE PROSECUTING ATTORNEY OR MEMBERS OF HIS LEGAL STAFF.**

8. This request is obviously an attempt to access internal documents of prosecutors and police officers made in connection with this case which are exempt from Discovery under Rule 3A:11(2). It must be denied as contrary to the law.

**ANY ORAL OR WRITTEN STATEMENT MADE BY ANY ALLEGED PARTICIPANTS OR ANY OTHER WITNESSES DURING POLICE INVESTIGATIONS AND INQUIRIES INCLUDING, BUT NOT LIMITED TO, DEFENDANT'S ROLE OR INVOLVEMENT IN THE KILLING OF THE VICTIM AND EVENTS SURROUNDING THE KILLING, BEFORE, DURING, AND AFTER, WHICH IS EXCULPATORY IN ANY MATTER AS TO THE DEFENDANT.**

9. The gravamen of defendant's request in this paragraph is difficult to understand. The Commonwealth is cognizant of its duty to disclose exculpatory information to the Defendant and it will do so consistent with its obligation to the administration of justice. It is noted that the Defendant has told more than one person that he personally shot Mrs. Franklin in the head in the Home Depot killing which is at issue in this case.

**ANY ORAL OR WRITTEN STATEMENT MADE BY ANY ALLEGED PARTICIPANTS OR ANY OTHER WITNESSES THAT DIMINISHES OR NEGATES THE ROLE OF THE DEFENDANT IN THE MURDER OF THE VICTIM AND EVENTS SURROUNDING IT, BEFORE, DURING, AND AFTER.**

10. The Commonwealth answers this paragraph by reference to the preceding answer to paragraph 9. The request seems to request very similar materials to those requested under paragraph 9.

**ANY INFORMATION FROM ANY PERSON, INCLUDING BUT NOT LIMITED TO OTHER WITNESSES, THAT THE DEFENDANT WAS NOT INVOLVED IN OR WAS NOT THE ACTUAL CAUSE OF THE DEATH OF THE VICTIM.**

11. The Defendant has admitted on more than one occasion that he shot Mrs. Franklin in the head at the Home Depot. He has also admitted to killing a number of other victims himself with the aid of his co-defendant who acted as his spotter and helper. The



Commonwealth is aware of its duty to disclose evidence tending to show the Defendant is not guilty or that might mitigate his culpability. If the Defendant is aware of any specific information that would tend to show that the Defendant was not the actual cause of the death of the victim or that he was not involved, the Commonwealth hereby requests the Defendant to provide such information to it forthwith, and the Commonwealth will with all due diligence investigate it.

**ANY AND ALL RECORDS AND INFORMATION REVEALING PRIOR FELONY CONVICTIONS OR GUILTY VERDICTS OR JUVENILE ADJUDICATIONS ATTRIBUTED TO EACH WITNESS TO BE CALLED BY THE COMMONWEALTH AT ANY HEARING IN OR TRIAL OF THIS CASE, INCLUDING BUT NOT LIMITED TO RELEVANT "RAP SHEETS."**

12. The Defendant is entitled to the criminal records of the Commonwealth's witnesses which the Commonwealth hereby agrees to provide. However the Commonwealth requests that the Court Order the Commonwealth to provide these records upon the completion of the direct testimony of said witnesses. Such an Order would protect the Commonwealth from having to disclose the names of its witnesses prior to trial, which it is not required to do under Rule 3A:11 (2). Furthermore such an Order would protect the Defendant's ability to cross examine the Commonwealth's witnesses, and impeach them where appropriate by their prior convictions. It should be noted that the Defendant in impeaching a witness is limited to asking the witness the names and number of felonies and misdemeanors involving moral turpitude, for which the witness has been convicted. The provision of this information in the manner suggested by the Commonwealth fully affords the Defendant the opportunity to impeach the Commonwealth's witnesses, while protecting the witnesses as well as the integrity of the Commonwealth's case in the pre trial stages. The Discovery Order which is

attached hereto is one drafted by the former Chief Judge of the Fairfax County Circuit Court, the Honorable Judge James Cacheris. It is submitted that this Order provides for the same procedure suggested by the Commonwealth here with respect to the criminal records of witnesses. This Order has withstood the test of time and has been repeatedly relied upon in this Circuit for more than two decades now.

**ANY AND ALL RECORDS AND INFORMATION REVEALING PRIOR MISCONDUCT OR BAD ACTS ATTRIBUTED TO ANY WITNESS.**

13. Bad acts and misconduct of witnesses are not admissible for impeachment purposes unless they meet the definition of impeachment materials as discussed in the Commonwealth's response to the previous paragraph. The Commonwealth is not required to provide such collateral and intrusive information about its witnesses to the defense.

**ANY AND ALL CONSIDERATION OR PROMISES OF CONSIDERATION GIVEN TO, EXPECTED, OR HOPED FOR BY A WITNESS. BY "CONSIDERATION," THE DEFENDANT REFERS TO ABSOLUTELY ANYTHING, WHETHER BARGAINED FOR OR NOT, WHICH ARGUABLY COULD BE OF VALUE OR USE TO SUCH A POTENTIAL WITNESS OR TO PERSONS OF CONCERN TO SUCH A WITNESS, INCLUDING BUT NOT LIMITED TO FORMAL OR INFORMAL, DIRECT OR INDIRECT PROMISES OF LENIENCY, FAVORABLE TREATMENT, RECOMMENDATION OR OTHER ASSISTANCE WITH RESPECT TO ANY PENDING OR POTENTIAL CRIMINAL, PAROLE, PROBATION, PARDON, CLEMENCY, CIVIL, TAX COURT, COURT OF CLAIMS, ADMINISTRATIVE, PUBLIC ASSISTANCE, OR OTHER DISPUTE WITH THE COMMONWEALTH, ANOTHER SOVEREIGN, OR ANY LOCAL GOVERNMENT.**

14. The Defendant's request is overbroad. The Commonwealth is only required to disclose any consideration it gives to a witness in exchange for his truthful testimony. This could include money or some plea agreement or agreement not to pursue criminal charges. However, the Commonwealth cannot reasonably be expected to provide what the witness might "hope" to gain from testifying. There is no legal requirement to

supply such inchoate materials to the defense under the rules of Discovery. Finally if the consideration is not "bargained for" then it is not discoverable. For instance, a particular witness may hope to feel better about himself by testifying truthfully; or, he may wish to demonstrate to others that he is a good citizen by testifying. In either case, if the Commonwealth doesn't provide the consideration to the witness in exchange for his testimony, then the Commonwealth is not obligated to disclose the witnesses' reasons for testifying except insofar as they may constitute exculpatory evidence.

**ANY AND ALL THREATS, EXPRESS OR IMPLIED, DIRECT OR INDIRECT, OR OTHER COERCION MADE OR DIRECTED AGAINST ANY POTENTIAL WITNESS INCLUDING BUT NOT LIMITED TO; CRIMINAL PROSECUTIONS, INVESTIGATIONS, OR POTENTIAL PROSECUTIONS PENDING OR WHICH COULD BE BROUGHT AGAINST ANY POTENTIAL WITNESS; ANY PROBATIONARY, PAROLE, DEFERRED PROSECUTION OR CUSTODIAL STATUS OF ANY POTENTIAL WITNESS; AND ANY CIVIL, TAX COURT, COURT OF CLAIMS, ADMINISTRATIVE, PUBLIC ASSISTANCE, OR OTHER PENDING LEGAL DISPUTES OR TRANSACTIONS INVOLVING ANY POTENTIAL WITNESS WITH THE COMMONWEALTH OR OVER WHICH THE COMMONWEALTH HAS REAL, APPARENT OR PERCEIVED INFLUENCE.**

15. The Defendant's request is vague and overbroad. Again, the Commonwealth agrees it must disclose any plea agreement or consideration given to a witness in exchange for his truthful testimony. The Commonwealth requests the Court to deny Defendant's request as stated under paragraph 14.

**THE EXISTENCE AND IDENTIFICATION OF EACH OCCASION ON WHICH ANY POTENTIAL WITNESS HAS TESTIFIED BEFORE ANY COURT, GRAND JURY, OR OTHER TRIBUNAL OR BODY OR OTHERWISE OFFICIALLY NARRATED IN RELATION TO ANY OF THE DEFENDANTS, THE INVESTIGATION, OR THE FACTS OF THIS CASE.**

16. There is no authority whatsoever for the information requested in this paragraph. It is respectfully submitted that this request borders on the frivolous. It should be noted that the Defendant enjoyed a preliminary hearing in the Juvenile and Domestic Relations

Court that lasted for two days. He has a transcript of that proceeding in which more than twenty Commonwealth's witnesses testified. Finally, the Defendant was granted great leeway in that proceeding in cross examining the Commonwealth's witnesses. A reading of the transcript shows that the defendant was granted a great quantity of Discovery at that hearing with relatively few objections from the Commonwealth.

**THE EXISTENCE AND IDENTIFICATION OF EACH OCCASION ON WHICH EACH POTENTIAL WITNESS WHO WAS OR IS AN INFORMER, ACCOMPLILCE, OR CO-CONSPIRATOR HAS TESTIFIED BEFORE ANY COURT, GRAND JURY, OR OTHER TRIBUNAL OR BODY.**

17. The Defendant is simply not entitled to this information under any case, statute or theory of law of which the Commonwealth is aware. Moreover, many Grand Jury proceedings are secret as a matter of law.

**ALL MEMORANDA, DOCUMENTS, AND REPORTS TO, FROM AND BETWEEN LAW ENFORCEMENT OFFICERS CONNECTED WITH ANY MATTER RELATING TO THE STATEMENTS AND INFORMATION PROVIDED BY THE JAILHOUSE INFORMANTS WHO ALLEGEDLY HEARD THE DEFENDANT MADE AN INCRIMINATING STATEMENT, INCLUDING BUT NOT LIMITED TO DOCUMENTS RELATING TO THE JAILHOUSE INFORMANTS. THESE REPORTS MAY INCLUDE BUT ARE NOT LIMITED TO POLICE INVESTIGATIONS OF THE CRIMES OR OTHER ACTIVITIES OF THE JAILHOUSE INFORMANTS.**

18. The Defendant is not entitled to copies, or even the substance of his incriminating statements, unless they were made to law enforcement or agents of law enforcement and those statements are within the knowledge of the Commonwealth's Attorney or it's agents. Under no circumstance is Defendant entitled to the statements he made to fellow inmates, friends or others who were not acting agents of the Commonwealth, or as law enforcement agents. The Commonwealth's duty to provide the Defendant's statements is clearly set forth in Rule 3A :11 (b) (i). The Commonwealth's duty does

not extend so far as Defendant would have the Court stretch it. Regardless, as a practical matter Defendant already knows the people to whom he may have incriminated himself since he was presumably present when he did so. See also Jeffries v. Commonwealth, 6 Va. App. 21 (1988).

**ALL MEMORANDA, DOCUMENTS AND REPORTS TO, FROM AND BETWEEN THE INVESTIGATIVE STAFF OF THE COMMONWEALTH, RELATING TO MATTERS SET FORTH IN PARAGRAPH 18, EXCLUDING THOSE PORTIONS, IF ANY, WHICH CONTAIN THE OPINION, THEORIES, OR CONCLUSIONS OF THE PROSECUTING ATTORNEY OR MEMBERS OF HIS LEGAL STAFF.**

19. The Commonwealth makes the same objection as it made in response to the preceding paragraph (18) and adds that the Defendant is seeking internal documents of the Commonwealth's Attorney's office which are specifically exempted from Discovery under Rule 3A11. Since the Defendant is not entitled to the statements of witnesses, he merely asks for reports and documents which might cite to those statements in the hope of subverting the letter and spirit of Rule 3A:11. This attempt at circumvention of the rules of Discovery should be denied.

**ANY ORAL OR WRITTEN JAILHOUSE INFORMANTS' STATEMENTS CONCERNING THE DEFENDANTS'S ALLEGED KILLING OF THE VICTIM THAT ARE INCONSISTENT WITH STATEMENTS OF OTHER PERSONS, INCLUDING BUT NOT LIMITED TO ANYONE INTERVIEWED BY AGENTS OF THE COMMONWEALTH.**

20. The Commonwealth objects to providing this material because the request amounts to a not so thinly veiled attempt to access the statements of some potential Commonwealth's witnesses. Such Discovery is prohibited by the very language of Rule 3A :11 as well as by the cases previously cited which interpret Rule 3A:11. Hackman v. Commonwealth, 220 Va. 710 (1980); Currie v. Commonwealth, 10 Va. App 298 (1990); Claggett v. Commonwealth, 252 Va. 79 (1996).

**ANY ORAL OR WRITTEN STATEMENTS FROM ANY OTHER PARTIES THAT WOULD IN ANY WAY CAST DOUBT ON THE TRUTHFULNESS OF THE JAILHOUSE INFORMANTS' STATEMENTS CONCERNING THE DEFENDANT'S ALLEGED STATEMENTS.**

21. This request is overbroad and vague. The Commonwealth is aware that it must provide the criminal record for felonies and misdemeanors of moral turpitude for any "jailhouse informants." The Commonwealth also recognizes its duty to turn over exculpatory inconsistencies in the statements of any such witnesses, as well as any promises of consideration made in exchange for the witness's testimony. However, the Defendant's request with respect to these matters is confusing and goes beyond that which is required by law and ethics.

**ANY STATEMENTS MADE BY THE JAILHOUSE INFORMANTS REGARDING THE DEFENDANT'S ALLEGED STATEMENT, WHICH ARE INCONSISTENT WITH OTHER STATEMENTS, ORAL OR WRITTEN OF THE INFORMANT, OR INCONSISTENT WITH OTHER FACTS GATHERED BY AGENTS OF THE COMMONWEALTH.**

22. The Commonwealth is required to divulge inconsistent statements of its witnesses only insofar as the inconsistencies are material, or exculpatory. Simply because an informant's statements are "*inconsistent with facts gathered by agents of the Commonwealth*" does not render them exculpatory or discoverable. There could be any number of explanations for inconsistencies, none of which amount to exculpatory evidence. Mueller v. Commonwealth, 244 Va. 386 (1992); Satcher v. Commonwealth, 244 Va. 220 (1992).

**ANY ORAL OR WRITTEN JAILHOUSE INFORMANTS' STATEMENTS CONCERNING THE DEFENDANT'S ALLEGED STATEMENT THAT ARE INTERNALLY INCONSISTENT, INCLUDING BUT NOT LIMITED TO STATEMENTS MADE BY THE INFORMANTS.**

23. This request is confusing and the Commonwealth is unsure of its intended meaning.

Generally speaking, the Commonwealth is not required to disclose statements made by the Defendant to witnesses who are not acting as agents of the Commonwealth.

Ramirez v. Commonwealth, 220 Va. App. 292 (1995). If the statements that the Defendant made to others are internally inconsistent it is not necessarily so that they are also exculpatory. They might be inculpatory such as when a Defendant makes up several different and inconsistent stories in an attempt to evade responsibility for the crime. In that case the very fact that the Defendant gave inconsistent versions may be inculpatory. Another example where a suspect makes internally inconsistent statements which may be inculpatory occurs when a suspect gives several different alibi's to different people. If the informant is merely repeating what the Defendant told him, even if the Defendant has been inconsistent in his versions, the Commonwealth submits that such statements would not necessarily be exculpatory.

**ANY OTHER INFORMATION THAT WOULD TEND TO UNDERMINE THE CREDIBILITY OF THE JAILHOUSE INFORMANTS, INCLUDING BUT NOT LIMITED TO PROMISES, INDUCEMENTS, OR ANY AGREEMENTS MADE WITH COMMONWEALTH AGENTS.**

24. This request is overbroad in nature. The Commonwealth concedes that the Defendant is entitled to the criminal record for felonies and misdemeanors involving moral turpitude of any such informant only when the informant is to be called as a witness. In addition, Defendant is entitled to admissible exculpatory evidence as defined in the case law. Delap v. Dugger, 890 F.2<sup>nd</sup> 285 (11<sup>th</sup> Cir. 1989); Brady v. Maryland, 373 U.S. 83 (1963); U.S. v. Agurs, 427 U.S. 97 (1976); Giglio v. U.S., 405 U.S. 150 (1972); Kyles v. Whitley, 514 U.S. 419 (1995); U.S. v. Bagley, 473 U.S. 667 (1985).

**RECORDS OF THE JAILHOUSE INFORMANT AS AN INFORMANT OR WITNESS FOR THE COMMONWEALTH, ANOTHER STATE, OR THE UNITED STATES IN OTHER CASES.**

25. This request is beyond the scope of Rule 3A:11 and is without any supporting legal authority. The requested materials are immaterial on their face. Whether the witness was a witness for the government or an informant for that matter in the Commonwealth is not material in this case, subject to the rule in Keener v. Commonwealth, 8 Va. App. 208 (1989).

**ANY OTHER EXCULPATORY INFORMATION CONCERNING THE JAILHOUSE INFORMANTS.**

26. The Commonwealth agrees it should provide to Defendant exculpatory evidence regarding "jailhouse informants" but, only if the informant is to be called as a witness at trial, or in the event the materials are somehow exculpatory to the Defendant even if the informant were not to testify. This would be hard to imagine if the information goes only to the credibility of the informant.

**ANY COMPETENCY HEARING REPORTS OR OTHER DOCUMENTS RELATING TO CREDIBILITY FROM PROSECUTIONS OF THE JAILHOUSE INFORMANTS IN UNRELATED MATTERS.**

27. This request is overbroad and seeks information that is not discoverable and not necessarily exculpatory either. Under this request, information tending to show the informant was credible would have to be turned over. There is no such requirement in the law. Further, again, Defendant has failed to distinguish between informants who are witnesses and those who merely provide information. There is a distinction in the law regarding the Commonwealth's duties with respect to each type of informant.



Roviaro v. United States, 353 U.S. 53 (1957). The Defendant's request makes no distinction between the two and should be denied.

**ALL PRE-SENTENCE REPORTS WHEN JAILHOUSE INFORMANTS ARE THE SUBJECT.**

28. The confidentiality of pre-sentence reports are governed by Va. Code §19.2-299. This Code section restricts access to these reports to certain persons and entities under certain circumstances. As the Court is well aware, these reports contain personal information about the defendant's family. In some cases they contain rather personal information about the victim as well. The defendant does not fit under any exception to the statute and he is not entitled to any presentence reports even assuming the informant to which he refers in his request is going to testify at trial.

**ANY RELEVANT ORAL STATEMENTS MADE BY THE JAILHOUSE INFORMANTS TO POLICE BUT NOT RECORDED IN WRITING BY POLICE WHEN SUCH STATEMENTS WERE MADE.**

29. Again, Defendant is not entitled to the statements of the Commonwealth's witness oral or written.

**ANY INFORMATION FROM ANY PERSON, INCLUDING BUT NOT LIMITED TO OTHER PRISONERS AND GUARDS, THAT THE DEFENDANT DID NOT MAKE THE STATEMENTS ALLEGEDLY HEARD BY THE JAILHOUSE INFORMANTS.**

30. The language of this request is overbroad. As written it would seem to apply to the personal opinion, speculation and conjecture of any person as to whether the Defendant may not have made particular statements. Of course, if the Commonwealth has material exculpatory evidence relating to a statement attributed to the Defendant by others, it will provide such information to the Defendant.

**ANY INFORMATION FROM ANY PERSON, INCLUDING BUT NOT LIMITED TO OTHER PRISONERS AND GUARDS, THAT THE JAILHOUSE INFORMANTS HAVE A PROPENSITY OR MOTIVE TO LIE.**

31. This request is overbroad. As written it would seem to apply to the opinion, speculation or conjecture of any person as to the informant's motive to lie in any situation not limited to the matters at issue in this case. Moreover, the Commonwealth is not required to disclose impeachment evidence against a person who will not be called as a witness. Moreno v. Commonwealth, 10 Va. App. 408 (1990). The Commonwealth recognizes its obligation pursuant to United States v. Bagley, 473 U.S. 667 (1985) to disclose to Defendant information that shows potential bias of a Commonwealth's witness relative to the parties in this case.

**ANY INFORMATION FROM ANY PERSON, INCLUDING BUT NOT LIMITED TO THE JAILHOUSE INFORMANTS, OTHER PRISONERS OR GUARDS, THAT THE JAILHOUSE INFORMANTS HAD PERSONAL ANIMOSITY AGAINST THE DEFENDANT.**

32. The Commonwealth acknowledges its duty under United States v. Bagley, 473 U.S. 667 (1985) to provide information within its knowledge, custody and control that shows potential bias on the part of the Commonwealth's witnesses. This duty does not extend to such information concerning mere "tipsters" who may have supplied information but who will not testify in the trial.

**INFORMATION ON THE CIRCUMSTANCES UNDER WHICH THE DEFENDANT'S STATEMENTS WERE ALLEGEDLY MADE INCLUDING BUT NOT LIMITED TO HOW THE JAILHOUSE INFORMANTS HEARD THE DEFENDANT'S STATEMENTS, THE CONTEXT IN WHICH THE STATEMENTS WERE MADE, WHO INITIATED THE CONVERSATION/VERBAL EXCHANGE THAT RESULTED IN THE STATEMENTS BEING MADE, WHO THE DEFENDANT WAS MAKING THE STATEMENTS TO, ON WHAT DATE AND AT WHAT TIME THE STATEMENTS WERE MADE, WHERE THE STATEMENTS WERE MADE, WHERE THE JAILHOUSE INFORMANTS WHO ALLEGEDLY HEARD THE**

**STATEMENTS WERE IN RELATION TO THE DEFENDANT WHEN HE ALLEGEDLY MADE THE STATEMENTS, WHO ELSE WAS PRESENT WHEN THE DEFENDANT MADE THE STATEMENTS, WHO ELSE MAY HAVE HEARD THE STATEMENTS, WHAT ALLEGEDLY CAUSED THE DEFENDANT TO MAKE THE STATEMENTS.**

33. The requested information is beyond the scope of Rule 3A:11. The Commonwealth is not required to turn over even a partial list of its witnesses. Lowe v. Commonwealth, 218 Va. 670 (1977). None of the information requested in this paragraph is the proper subject of a Discovery request to the Commonwealth. Finally, the Defendant himself is in the best position to know with whom he has discussed this case. The Commonwealth is not required to disclose to the Defendant information of which he has equal access or knowledge.

**ANY INFORMATION ON THE RELATIONSHIP BETWEEN THE DEFENDANT AND THE JAILHOUSE INFORMANTS INCLUDING BUT NOT LIMITED TO ANY PRIOR HISTORY BETWEEN THE DEFENDANT AND THE JAILHOUSE INFORMANTS, AND WHETHER ANYONE OF THE JAILHOUSE INFORMANTS WERE EVER PLACED IN A CELL WITH THE DEFENDANT.**

34. The Commonwealth relies upon its answers to the Defendant's requests under paragraphs 31 and 32. In addition the Commonwealth is not required to provide the Defendant with a list of its witnesses. Lowe v. Commonwealth, 218 Va. 670 (1977). The Defendant's request for information as to whether the informant was a cellmate of Defendant is tantamount to a request for the identity of the witnesses. There is ample legal authority against this request and none in support of it.

**ALL SCIENTIFIC REPORTS PREPARED BY AN AGENT OF THE COMMONWEALTH OR AT THE REQUEST OF THE COMMONWEALTH IN THIS CASE, REGARDLESS OF THEIR POTENTIAL USE AT TRIAL.**

35. This is not a request for exculpatory evidence. The Commonwealth is not required to provide scientific reports unless the Defendant makes a motion pursuant to Rule 3A:11.

In the context of a motion under Rule 3A:11 the Commonwealth would agree to provide the requested reports conditioned upon reciprocal discovery duties being imposed upon the Defendant.

**ALL TANGIBLE, DEMONSTRATIVE, AND PHYSICAL EVIDENCE IN THE CASE, INCLUDING, BUT NOT LIMITED TO ANY WEAPONS, CLOTHES, MOTOR VEHICLES AND/OR PARTS OR ITEMS REMOVED THEREFROM, PERSONAL ITEMS, HAIR, BLOOD, FIBERS OR DOCUMENTS, AND OTHER PHYSICAL EVIDENCE WHICH MY BE IN THE POSSESSION OF THE COMMONWEALTH'S ATTORNEY, AGENTS, OR OTHERS WITHIN THE KNOWLEDGE OR CONTROL OF THE COMMONWEALTH.**

36. This is not a request for exculpatory evidence. It is a request for Discovery which is governed by Rule 3A: 11. The Commonwealth would agree to provide the items requested should the Commonwealth intend to introduce them in its case in chief, or upon a showing of materiality if Defendant requests them under a proper Rule 3A:11 motion contingent upon reciprocal Discovery.

**ALL STATEMENTS MADE TO POLICE WITNESSES TOGETHER WITH A COPY OF ANY MIRANDA SHEET OR OTHER DOCUMENT PURPORTING TO PROVE THAT THE DEFENDANT WAIVED HIS RIGHTS, AFTER LAW ENFORCEMENT ADVICE, BEFORE MAKING A STATEMENT.**

37. The Commonwealth objects to what amounts to a request for any statements made by witnesses to law enforcement. To the extent that Defendant seeks his own statements the Commonwealth's submits that such a request if properly made pursuant to a motion under Rule 3A:11 and not as a request for exculpatory evidence. The request for Miranda rights forms is properly made under Rule 3A: 11 and not under a motion styled as a request for exculpatory evidence.

**ALL STATEMENTS MADE TO WITNESSES WHO ARE NOT LAW ENFORCEMENT EMPLOYEES OR GOVERNMENT AGENTS SPECIFYING**

**THE DATE, TIME, PLACE AND CIRCUMSTANCES SURROUNDING ANY SUCH STATEMENTS.**

38. The Commonwealth objects to what amounts to a request for any statements made by witnesses to non law enforcement witnesses. The requested materials are not discoverable under Rule 3A:11.

**ANY AND ALL OTHER RECORDS AND/OR INFORMATION WHICH ARGUABLY COULD BE HELPFUL OR USEFUL TO THE DEFENSE IN IMPEACHING OR OTHERWISE DETRACTING FROM THE PROBATIVE FORCE OF THE COMMONWEALTH'S EVIDENCE OR WHICH ARGUABLY COULD LEAD TO SUCH RECORDS OR INFORMATION.**

39. This request is overbroad to the extent that it is difficult to give its language a meaningful interpretation. The Commonwealth is required to furnish to the Defendant information which is potentially exculpatory as defined by case law. The Commonwealth is not required to take a look at its case try to assist the defense in coming up with creative arguments to muddle the truth. There is no authority in support of Defendant's request for the information he seeks here.

**ANY EVIDENCE OF CIRCUMSTANCES SURROUNDING ANY ALLEGED MISCONDUCT OF DEFENDANT WHICH THE COMMONWEALTH INTENDS TO OFFER IN THE EVENT OF A PENALTY TRIAL IN THIS CASE, WHICH WOULD TEND TO EXPLAIN THE CONDUCT OR PROVES TO BE MITIGATING, INCLUDING BUT NOT LIMITED TO FAMILY CRISIS, FINANCIAL STRAIN, OR EMPLOYMENT STRESSORS.**

40. The Commonwealth objects to providing the information requested in this paragraph.

The Defendant may obtain information regarding the Defendant's prior misconduct which the Commonwealth intends to introduce at any penalty phase in this trial by filing a proper motion under Va. Code § 19.2-264.3:2. In addition the information requested is peculiarly available and within the custody, control and knowledge of the Defendant. Certainly if the Defendant desires to mount the traditional defenses of poor

family history, emotional stress and employment stressors, he is in the best position to know about these issues. The Commonwealth is not required to supply Defendant with information of which he already has direct and personal knowledge.

**ALL MEMORANDA, DOCUMENTS, AND REPORTS TO, FROM AND BETWEEN LAW ENFORCEMENT OFFICERS CONNECTED WITH ANY MATTER INTENDED TO BE OFFERED BY THE COMMONWEALTH IF A PENALY TRIAL OCCURS IN THIS CASE. INCLUDING BUT NOT LIMITED TO POLICE INVESTIGATIONS OF OTHER SUSPENCETS OR ANY EVIDENCE RELATING TO THE THOROUGHNESS AND GOOD FAITH OF THE PROSECUTION, POLICE OFFICERS AND INVESTIGATORS FOR THE COMMONWEALTH.**

41. The information requested in this paragraph so far as its meaning can be understood is not discoverable in Virginia. This paragraph is essentially a request for police reports and other internal documents which are not the proper subject of discovery. Spencer v. Commonwealth, 238 Va. 295 (1989). With respect to the Police having investigated other "suspects" the Commonwealth submits that if the result of the Police investigation cleared the "suspect" in question, information regarding such an investigation could hardly be considered exculpatory. The Commonwealth submits that for the information regarding other "suspects" to be truly exculpatory there must be some nexus or evidence linking the "suspect" to this crime beyond a mere suggestion by a citizen that for instance, "my neighbor is the kind of guy who would shoot people."

**ALL MEMORANDA, DOCUMENTS AND REPORTS TO, FROM AND BETWEEN THE INVESTIGATIVE STAFF OF THE PROSECUTION, RELATING TO MATTERS SET FORTH IN PARAGRAPH 41, EXCLUDING THOSE PORTIONS, IF ANY, WHICH CONTAIN THE OPINION, THEORIES, OR CONCLUSIONS OF THE COMMONWEALTH'S ATTORNEY OR MEMBERS OF HIS LEGAL STAFF.**

42. Furthermore, the Commonwealth is not required to view the issue of exculpatory evidence in a vacuum with respect to its determination as to whether particular evidence is exculpatory. Kyles v. Whitley, 514 U.S. 419 (1995). The Commonwealth is entitled to consider the evidence collectively when conducting its analysis of whether particular evidence is exculpatory. In the instant case it is submitted that the Defendant confessed to killing Mrs. Franklin. This confession was uncoerced and completely voluntary. There were no threats or promises made to the Defendant in the course of his admissions. In fact the Defendant was calm and rather boastful of his doings in this case. In the face of Defendant's admission to this killing, among others, which contains a fantastic amount of detail in support of its validity it escapes the Commonwealth as to how evidence of other "suspects" that were investigated by the police is even arguably exculpatory. This is especially clear when considered in the light of the large quantity of evidence presented against the Defendant in the Preliminary hearing on this case. While the Commonwealth embraces its duty to disclose exculpatory evidence, it is respectfully submitted that this duty does not extend to aiding the Defendant in concocting alternative theories of defense not supported by the facts and evidence in the case, but rather ultimately attributable to the fertile imagination of defense counsel.

**DIRECT INFORMATION ABOUT THE CIRCUMSTANCES OF DEFENDANT'S CONDUCT THAT WOULD SUGGEST APPROPRIATENESS OF A MORE LENIENT SENTENCE, INCLUDING PROVOCATION, STRESS, ETC.**

43. The matters sought here are peculiarly within the knowledge and control of the Defendant himself. They are equally, if not more available, to the defense than the Commonwealth. In response to the specific requests regarding provocation, and stress, made by Defendant, the Commonwealth provides as follows: None of the victim's did

a single thing to provoke their deaths. They were individuals conducting the business of ordinary life when they were murdered without warning. In answer to Defendant's request; therefore, the Commonwealth submits that there was no provocation on the part of the victims in this case. Insofar, as stress is concerned, the Commonwealth has not had the opportunity to delve into the Defendant's psyche so far. However, the Defendant has upon all reports to date been calm and for the most part relaxed. Beyond these responses to specific requests, again, the Defendant best knows the circumstances under which he committed these crimes.

**DIRECT EVIDENCE OF LAUDATORY CONDUCT BY DEFENDANT.**

44. Laudatory conduct does not necessarily constitute exculpatory evidence. However, the Commonwealth provides the following: The Defendant was a good student. He is bright. He voluntarily confessed to killing a number of people which might be said to constitute cooperation which is perhaps somewhat laudatory. The Commonwealth can not state, however, that the Defendant has expressed any remorse, which would arguably be "laudatory." The Commonwealth is aware of its duty to disclose information in mitigation of punishment insofar as such evidence is not equally available or known to the defense.

**ANY AND ALL EVIDENCE THAT ALONE OR IN CONJUNCTION WITH OTHER EVIDENCE OF ANY CHARACTER MAY CAST DOUBT UPON THE DEFENDANT'S GUILT.**

45. The Commonwealth does not have evidence that casts doubt upon Defendant's guilt. If information fitting the definition of exculpatory evidence as understood in the Commonwealth becomes available it will be provided to the defense.



**ANY AND ALL INFORMATION THAT ALONE OR IN CONJUNCTION WITH OTHER EVIDENCE CALLS INTO QUESTION THE CREDIBILITY OF THE COMMONWEALTH'S CASE INCLUDING, BUT NOT LIMITED TO, INFORMATION THAT INDICATES THAT THE TESTIMONY OF PROSECUTION WITNESSES IS CONSISTENT WITH OTHER INFORMATION IN THE COMMONWEALTH'S ACTUAL OR CONSTRUCTIVE POSSESSION.**

46. This request is vague, overbroad and redundant. Testimony of Commonwealth's witnesses which is inconsistent with other evidence is not necessarily exculpatory.

**ANY AND ALL EVIDENCE THAT ALONE OR INCONJUNCTION WITH OTHER EVIDENCE MAY BE EXCULPATORY IN ARGUING FOR A SENTENCE LESS THAN DEATH INCLUDING, BUT NOT LIMITED TO, INFORMATION CONCERNING THE COMMONWEALTH'S THEORIES JUSTIFYING THE CRIME CHARGED.**

47. This attempt to cause the Commonwealth to state its theory of its case is frivolous and contrary to legal authority. There is no right, constitutional or otherwise, to cause the Commonwealth to disclose its theory of the case. Strickler v. Commonwealth, 241 Va. 482 (1991). The Commonwealth's theories with respect to the evidence are not evidence themselves, they are merely mental impressions, work product and tactical considerations. They can not be exculpatory by there very nature. The Commonwealth does recognize its duty to provide information that may be material insofar as they apply to mitigation of punishment.

**WITNESS STATEMENTS CONCERNING THE UNADJUDICATED ACTS THAT ARE INCONSISTENT WITH STATEMENTS OF OTHER WITNESSES.**

48. This request is vague and overbroad. It does not necessarily call for exculpatory evidence. Only material inconsistencies in these statements may be exculpatory, when known to the Commonwealth or within its custody and control.

**WITNESS STATEMENTS CONCERNING THE UNADJUDICATED THAT ARE INTERNALLY INCONSISTENT.**

49. This request is vague and overbroad. Internal inconsistencies are not necessarily exculpatory. Whether the inconsistencies are exculpatory turns upon the context and nature of the inconsistencies in question. The Commonwealth is aware of its duties with respect to statements that are inconsistent.

**STATEMENTS FROM OTHER PARTIES CONFIRMING OR DENYING THE UNADJUDICATED ACTS.**

50. Statements confirming Defendant's unadjudicated bad acts can hardly be considered to be exculpatory. Statements denying the unadjudicated bad acts may be exculpatory if made by a witness to the bad act who denies the acts occurred under some circumstances. Statements made by others with no personal knowledge of the acts in question are not exculpatory.

**ANY OTHER INFORMATION THAT WOULD TEND TO UNDERMINE THE CREDIBILITY OF A WITNESS WHO WILL TESTIFY ABOUT THE UNADJUDICATED ACTS, INCLUDING PROMISES, INDUCEMENTS, PERSONAL ANIMOSITY OR BIAS TOWARD DEFENDANT.**

51. The Commonwealth is aware of its duties with respect to impeachment and bias of its witnesses towards parties in the case and will provide exculpatory information consistent with the law governing this type of evidence. Goins v. Commonwealth, 251 Va. 442 (1996).

**ANY OTHER INFORMATION THAT WOULD TEND TO UNDERMINE THE CREDIBILITY OF A WITNESS WHO WILL TESTIFY ABOUT UNADJUDICATED ACTS, INCLUDING PROMISES, INDUCEMENTS, PERSONAL ANIMOSITY OR BIAS TOWARD DEFENDANT.**

52. This request appears to be repetitive of the previous request. The Commonwealth adopts its response to paragraph 51. In answer to this paragraph.

**ALL EVIDENCE CONCERNING THE PROFESSIONALISM AND GOOD FAITH OF THE POLICE INVESTIGATION OF THE UNADJUDICATED ACTS, INCLUDING INFORMATION ON OTHER SUSPECTS.**

53. This request is vague, overbroad, and calls for evidence which is not exculpatory. It is difficult to discern any clear meaning from the language of this request. As far as the Commonwealth can observe the Police are acting with their customary good faith and professionalism in the course of this investigation.

**ANY OTHER EVIDENCE OF THE CIRCUMSTANCES OF THE CRIME OR THE CHARACTER AND RECORD OF ANY PARTY TO THE CRIME THAT WOULD TEND TO SHOW THAT ANOTHER PARTY WAS MORE CULPABLE, MORE DOMINANT OR MORE DANGEROUS THAN THE DEFENDANT.**

54. The record of Defendant's co-defendant will be provided to the Defense. With respect to the specific requests of Defendant the Commonwealth submits the following: Both this Defendant and his co-defendant are very dangerous. There is nothing in this Defendant's demeanor or history to suggest that he is less violent or dangerous than his co-defendant. The co-defendant is older than this Defendant. This Defendant often refers to his co-defendant in conversation as his father, although there is no blood relation. It appears from the evidence so far, that this Defendant acted in concert with his co-defendant, operating as a "sniper team." One would be the spotter, while the other would do the shooting. They acted as a unit. Doubtless many friends and relatives of this Defendant and the co-defendant will have opinions as to who was more dominant or culpable. In fact, this Defendant claimed both were equals and either could call a particular shot on or off. Regardless this information is equally available to the defense, perhaps more so in connection information within the control of the Defendant's family.

**ANY EVIDENCE THAT IS PROBATIVE OF THE CREDIBILITY OF A WITNESS FOR THE PROSECUTION WHO WILL TESTIFY AS AN EXPERT IN PSYCHIATRY, PSYCHOLOGY, OR PREDICTING FUTURE DANGEROUSNESS, INCLUDING, BUT NOT LIMITED TO:**

- (A) A COMPLETE ACCOUNT OF ANY INSTANCE IN WHICH THE EXPERT EXAMINED OR ATTEMPTED TO EXAMINE A CRIMINAL DEFENDANT FOR FUTURE DANGEROUSNESS WITHOUT OBTAINING WAIVER OF HIS MIRANDA RIGHTS AND NOTIFYING THE DEFENDANT'S LAWYER ABOUT THE EXAMINATION AND ITS SCOPE IN ADVANCE.**
- (B) COPIES OF THE RESULT OF EVERY EXAMINATION FOR FUTURE DANGEROUSNESS THAT THE EXPERT HAS PERFORMED IN A CAPITAL MURDER TRIAL IN WHICH HE WAS EITHER APPOINTED BY THE COURT AS A NEUTRAL EXPERT OR HIRED BY THE PROSECUTION AS AN EXPERT OR, IN THE ALTERNATIVE, IF THE RESULTS ARE A MATTER OF PUBLIC RECORD, THE NAME OF EACH DEFENDANT EXAMINED, THE VENUE, THE CAUSE NUMBER, AND THE DATE THE RESULTS WERE FILED IN THE RECORD.**
- (C) THE CRIMINAL RECORD, PRISON DISCIPLINARY RECORD AND PAROLE RECORD OF EVERY DEFENDANT WHO HAS BEEN SENTENCED TO DEATH IN A VIRGINIA MURDER TRIAL IN WHICH THE EXPERT TESTIFIED FOR THE PROSECUTION AND PREDICTED ON THE BASIS OF AN EXAMINATION OR A HYPOTHETICAL QUESTION THAT THE DEFENDANT WOULD BE DANGEROUS.**
- (D) THE NAME, VENUE AND CASE NUMBER OF EVERY CAPITAL MURDER TRIAL IN VIRGINIA IN WHICH THE EXPERT HAS TESTIFIED FOR THE PROSECUTION ABOUT THE ISSUE OF FUTURE DANGEROUSNESS.**
- (E) THE NAME, VENUE, AND CASE NUMBER OF EVERY CAPITAL MURDER TRIAL IN VIRGINIA IN WHICH THE EXPERT HAS TESTIFIED FOR THE DEFENSE ABOUT THE ISSUE OF FUTURE DANGEROUSNESS.**
- (F) THE NAME, VENUE, AND CASE NUMBER OF EVERY CAPITAL MURDER CASE IN VIRGINIA IN WHICH THE EXPERT WAS APPOINTED BY A COURT OR HIRED BY A PROSECUTOR TO DETERMINE WHETHER THE DEFENDANT WAS DANGEROUS AND THE EXPERT**

**CONCLUDED THAT THE DEFENDANT WAS NOT DANGEROUS OR CONCLUDED THAT HE LACKED SUFFICIENT INFORMATION TO RENDER AN OPINION.**

**(G) THE NAME, VENUE, AND CASE NUMBER OF EVERY CAPITAL MURDER CASE IN VIRGINIA IN WHICH THE EXPERT TESTIFIED THAT THE DEFENDANT WOULD BE DANGEROUS AND LATER CONCLUDED THAT HIS OPINION WAS MISTAKEN OR BASED ON INSUFFICIENT DATA.**

**(H) ANY DATA, NOTES OR OTHER INFORMATION COMPLIED BY THE EXPERT OR HIS AGENTS IN AN EFFORT TO DETERMINE THAT HIS PREDICTIONS OF FUTURE DANGEROUSNESS IN CAPITAL MURDER TRIALS WERE EITHER ACCURATE OR INACCURATE.**

**(I) A TRANSCRIPT OF ANY FALSE TESTIMONY GIVEN UNDER OATH BY THE EXPERT ABOUT HIS QUALIFICATIONS, HIS METHOD OF PREDICTING FUTURE DANGEROUSNESS OR THE FACTS OF A PARTICULAR CASE IN WHICH HE PREDICTED FUTURE DANGEROUSNESS, IRRESPECTIVE OF WHETHER THE EXPERT KNEW AT THE TIME THAT HIS TESTIMONY WAS FALSE.**

**(J) A COMPLETE ACCOUNT OF ANY CASE IN WHICH THE EXPERT WAS ACCUSED OF PROFESSIONAL MALPRACTICE, VIOLATING THE HIPPOCRATIC OATH OR ANY OTHER KIND OF PROFESSIONAL MISCONDUCT IN A PROCEEDING CONDUCTED BY A COURT, A GOVERNMENT AGENCY OR A PROFESSIONAL SOCIETY.**

55. The Defendant's ten part request under this paragraph does not in some instances even remotely relate to a call for exculpatory evidence. Since there is no constitutional right to Discovery in Virginia, the production of Discovery materials is governed by Rule 3A:11. Lowe v. Commonwealth, 218 Va. 670 (1977). The materials requested hereunder are not discoverable nor are they exculpatory.

- a. This request does not call for exculpatory information. Experts are not required to advise Defendant's of Miranda when conducted examinations requested by

defendants under Va. Code §19.2-264.3:1. Savino v. Commonwealth, 239 Va. 534 (1990).

- b. This request does not call for exculpatory evidence. Further, it ignores the fact that in some cases the results of these examinations are confidential and protected by the attorney client privilege under Va. Code §19.2-264.3:1(D). Finally, those records which are not covered by the attorney client privilege are public documents and equally accessible to both the Commonwealth and the defense.
- c. This request does not call for exculpatory evidence. Defendant fails to state any basis under which such materials would be exculpatory. Moreover, any such testimony would be a matter public record. It must be noted that among five highly competent and distinguished lawyers assisting in his defense, the Defendant enjoys the assistance of Virginia's anti-death penalty, advocacy group/think tank, to wit ; *The Capital Case Clearinghouse*. Upon information and belief this group keeps extensive records on capital murder cases in Virginia and publishes a journal.
- d. This request does not call for exculpatory information. The materials are not otherwise discoverable under Rule 3A 11.
- e. This request does not call for exculpatory information. The requested materials are not otherwise discoverable under Rule 3A:11.

- f. This request does not call for exculpatory information. The requested materials are not otherwise discoverable under Rule 3A :11.
- g. This request does not call for exculpatory information. The information is not otherwise discoverable under Rule 3A:11.
- h. This request does not call for exculpatory evidence and the information is not otherwise discoverable under Rule 3A:11.
- i. To the extent the Commonwealth becomes aware of any prior knowing false testimony given by any such expert it will turn it over to the defense along with the witnesses' record of conviction for perjury if applicable. Otherwise the Defendant's request is overbroad, confusing and vague. Does Defendant construe an honest mistake in testimony, or a momentary confusion, or misspeak, as a false statement, even as he says, when the expert is *unaware at the time that the testimony was false?*
- j. This request is overbroad and reaches to items that are not necessarily exculpatory. As the Court is aware anyone may be accused of anything, by anyone. Such naked allegations and accusations falling short of solid proof are not necessarily exculpatory.

**THE DEFENDANT MOVES FOR AN ORDER REQUIRING THE COMMONWEALTH TO SECURE AND PRESERVE ANY HANDWRITTEN NOTES OF ANY LAW ENFORCEMENT OFFICER, GOVERNMENT AGENT OR INFORMANT INVOLVED IN THIS CASE, IN ORDER TO ASSURE THEIR PRODUCTION IN COURT, IF AND WHEN ORDERED BY THE COURT.**

56. This is not a request for exculpatory evidence. Further, it is unsupported in law and utterly without authority.

**A REPORT BY THE COMMONWEALTH DETAILING ANY EVIDENCE IN ANY FORM OR MEDIUM, ONCE IN EXISTENCE BUT NOW LOST OR DESTROYED, COVERED BY PARAGRAPHS 1- 56 ABOVE, ALONG WITH AN EXPLANATION OF HOW THE EVIDENCE CAME TO BE LOST OR DESTROYED. THE DEFENDANT ASKS THAT ALL ORDERS FOR DISCOVERY AND PRODUCTION REQUESTED HEREIN DIRECT THAT THE DUTY OF THE COMMONWEALTH REGARDING THE DISCLOSURE OF THE FOREGOING INFORMATION AND MATERIAL CONTINUES UNTIL TRIAL AND SHALL NOT BE DEPENDENT UPON FURTHER MOTIONS; THAT THE DISCLOSURE AND PRODUCTION BY THE COMMONWEALTH SHALL PROCEED FORTHWITH WITH ALL REASONABLE SPEED; THAT INFORMATION FOR WHICH THE COMMONWEALTH IS RESPONSIBLE BE DISCLOSED TO THE DEFENSE IN ANY EVENT NO LATER THAN MAY 1, 2003, OR SUCH OTHER DATE CERTAIN AS MAY BE ORDERED AFTER HEARING ON THIS MATTER; THAT UPON RECEIPT OR LEARNING OF THE EXISTENCE OF ANY OF THE AFOREMENTIONED INFORMATION NOT NOW KNOWN TO THE COMMONWEALTH, OR IN ITS POSSESSION, DISCLOSURE SHALL BE MADE TO THE DEFENSE WITHIN SEVEN (7) DAYS OF SUCH RECEIPT OR KNOWLEDGE.**

**(B) THE DEFENDANT FURTHER RESPECTFULLY PRAYS THAT THE COURT ORDER THAT ANY AS TO EVIDENCE OF UNCERTAIN EXCULPATORY VALUE OR MATERIALITY, THE COMMONWEALTH DELIVER SUCH EVIDENCE TO THE COURT TO BE REVIEWED IN CAMERA TO DETERMINE WHETHER THE INFORMATION IS CONSTITUTIONALLY REQUIRED TO BE DISCLOSED TO THE DEFENDANT IN ANY PART OF THE CAPITAL TRIAL.**

57. The Commonwealth objects to the Defendant's request that the Court order it to prepare a "report" for the Defendant regarding *any evidence in any form or medium, once in existence but now lost or destroyed, covered by paragraphs 1-56 above*,... First the Commonwealth has repeatedly objected to many of the requests in Defendant's so-called Motion For Timely Disclosure Of Exculpatory Evidence. Most of the information requested falls short of being exculpatory, and moreover, it is not even



discoverable. The Commonwealth is under no obligation to prepare any "report" for Defendant. The Defendant is clearly on a fishing expedition here without support in fact and law. The Commonwealth asks the Court to deny this request.

### **SUMMARY**

As has been individually set forth in the Commonwealth's responses to Defendant's various requests for exculpatory evidence, most of these requests do not deal with exculpatory evidence at all and should be denied on that basis. The Commonwealth respectfully suggests that the Court enter an Order with respect to the Defendant's Motion for Discovery which includes the citations to the seminal exculpatory evidence cases which bind the Commonwealth. This Order, drafted by former Chief Judge Cacheris, sets forth the Commonwealth's obligations in a simple and straightforward manner, by reference to the pertinent cases. It is the Commonwealth's intention to fully comply with the letter and spirit of the rules regarding exculpatory evidence. The propose order is sufficient to make a matte of record defendant's request for such information as well as the Commonwealth's understanding of its moral and legal obligation to provide it.

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Response to Defendant's Motion was made available and mailed to Michael Arif, Esquire and Criag Cooley, Esquire, Counsel for the Defendant, this 24<sup>th</sup> day of February, 2003

RAYMOND F. MORROGH